

STATE OF MICHIGAN
COURT OF APPEALS

LEEANN MARTUCH,

Plaintiff-Appellee,

v

ST MARY'S MEDICAL CENTER,

Defendant-Appellant.

UNPUBLISHED

August 21, 2008

No. 274267

Saginaw Circuit Court

LC No. 03-049050-NZ

Before: Wilder, P.J., Saad, C.J., and Smolenski, J.

PER CURIAM.

In this interlocutory appeal, defendant challenges the trial court's orders that partially denied defendant's motion in limine and that denied its motion to amend its affirmative defenses. We reverse in part and affirm in part and remand for further proceedings.

I. Facts and Proceedings

Plaintiff was employed in defendant's human resources department. She befriended Geraldine Sobek, a manager in the department. In February 2000, defendant terminated Sobek's employment along with the employment of several other managers. Sobek sued defendant, alleging that defendant discriminated against her based on age, in violation of the Michigan Civil Rights Act ("MCRA"), MCL 37.2202, and in violation of defendant's own employment policies.¹ Plaintiff's employment with defendant ended later in 2000. The parties dispute the circumstances surrounding plaintiff's separation from defendant. Plaintiff alleges that defendant terminated her employment because she encouraged Sobek to pursue her legal action against defendant, and continued to socialize with Sobek in defiance of defendant's instructions. Defendant acknowledges that plaintiff lost her position in the human resources department, but it

¹ See *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993); *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980).

contends that she was offered a position in a different department, which she rejected in order to accept employment elsewhere.²

On May 28, 2003, the trial court in Sobek's lawsuit against defendant granted defendant's motion for summary disposition with respect to her age discrimination claim, but her breach of policy claim was allowed to proceed to trial. Meanwhile, on July 16, 2003, plaintiff brought this action against defendant. Plaintiff alleged that defendant terminated her because she supported Sobek's age discrimination lawsuit, in violation of § 701 of the MCRA, which prohibits retaliation against persons for engaging in protected activity under the Act. MCL 37.2701. Plaintiff attached to her complaint several documents containing personnel information that she downloaded and printed from defendant's computers before she left her employment. Defendant alleges that these are confidential documents, and that plaintiff would have been terminated for taking and disseminating the documents were she still employed with defendant.

In August 2003, the jury in Sobek's lawsuit awarded her \$2,188,723 in damages for her breach of policy claim, and defendant appealed to this Court, and Sobek cross-appealed the trial court's grant of summary disposition on her age discrimination claim. Defendant and Sobek voluntarily dismissed the appeals pursuant to a settlement for an undisclosed amount.³ Meanwhile, in plaintiff's action, defendant moved in limine to exclude evidence regarding the verdict in the Sobek case.⁴ The trial court denied the motion on the theory that Sobek's victory, and the amount of the jury verdict, are relevant to defendant's motivation to retaliate against plaintiff for her support of Sobek.

Defendant also moved in limine to limit damages based on subsequently discovered employee misconduct. Defendant argued that plaintiff could not obtain relief in the form of front pay because she would have been dismissed for appropriating confidential information. On July 10, 2006, the trial court denied the motion on the ground that defendant was required to raise this issue as an affirmative defense. Trial was originally set for August 1, 2006, but the trial was postponed for five months due to a scheduling conflict in the trial court's docket. Defendant moved for leave to amend its affirmative defenses on October 2, 2006, but the trial court denied the motion for untimeliness and futility. The court apparently accepted plaintiff's argument that the amendment would be futile because the factual circumstances surrounding the breach of confidentiality did not establish grounds for restriction of relief based on subsequently discovered employee misconduct.

² Plaintiff also contends that the job transfer would have resulted in a substantial loss of compensation.

³ Three other employees who were dismissed at the same time as Sobek also brought lawsuits against defendant. Defendant also voluntarily settled these lawsuits at the time it settled the Sobek appeal.

⁴ Defendant also moved to exclude evidence regarding the settlement agreement it reached with Sobek. The trial court granted this part of the motion, albeit with the caveat that the evidence would be admitted if defendant opened the door at trial to the issue.

We granted leave to appeal.

II. Analysis

A. Evidence of \$2.18 Million Damage Award

I

Defendant argues that the trial court erred in denying its motion to exclude evidence that Sobek received a \$2.18 million damage award against defendant. We agree.⁵

Plaintiff claims that defendant fired her in retaliation for plaintiff's support of Sobek in Sobek's lawsuit against defendant, in violation of MCL 37.2701.⁶ To prove her retaliation claim, plaintiff must show that (1) she engaged in a "protected activity," (2) defendant knew about it, (3) defendant took an adverse employment action against her, and (4) "there was a causal connection between the protected activity and the adverse employment action." *Meyer v Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000).

Defendant argues that the evidence of the Sobek verdict is irrelevant to plaintiff's retaliation claim, or, in the alternative, that the prejudicial effect of the evidence outweighs the probative value. MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, relevant evidence is admissible, while irrelevant evidence is inadmissible. MRE 402. MRE 403 permits the trial court to exclude relevant evidence "if its probative value is substantially outweighed by the

⁵ We review this issue for abuse of discretion. *Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

⁶ MCL 37.2701 provides, in pertinent part:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

* * *

(f) Coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

The trial court incorrectly analyzed this issue pursuant to MCR 404(b)(1) because the Sobek verdict does not fall within the category of “other crimes, wrongs, or acts,” which would require an analysis under MRE 404(b). Any wrongful act that defendant committed with respect to Sobek occurred in 2000, when it allegedly terminated her based on her age and in violation of its own employment policies. Moreover, the fact of the verdict is not an act that defendant committed, but rather a jury and trial court’s pronouncement on the legal and factual merits of Sobek’s claim. And, the verdict postdates the conduct at issue here.

Indeed, that a jury returned a verdict for Sobek three years after plaintiff’s alleged termination, and awarded her \$2.18 million damages, is not admissible to establish defendant’s motives at the time it allegedly committed the acts that gave rise to plaintiff’s lawsuit, because events that occurred in 2003 are too remote in time to explain defendant’s motives for decisions and actions it made in 2000. *Stranahan v Genesee Farmers Mut Ins Co*, 242 Mich 423, 416; 218 NW 688 (1928). Rather, the proper focus of plaintiff’s retaliation claim is defendant’s alleged motive in 2000 to shield itself from the risk of an uncertain outcome.

Additionally, plaintiff’s cause of action is based on MCL 37.2701, which prohibits retaliation against persons who engage in protected activity under the MCRA. Although supporting Sobek’s age discrimination action is protected activity under the MCRA, supporting her common-law breach of policy claim is not. Sobek’s age discrimination claim was dismissed before her trial; accordingly, the verdict reflected only the jurors’ findings regarding the breach of policy claim. Therefore, it is not relevant to defendant’s alleged retaliatory conduct. Even if the evidence were relevant to establish defendant’s motive to deter plaintiff from assisting Sobek with her breach of policy claim, this is not relevant to her claim under the MCRA.

Furthermore, if the evidence were admissible under MRE 401 and 402, the prejudicial effect outweighs the probative value, rendering it inadmissible under MRE 403. The fact that Sobek prevailed against defendant in her lawsuit tends to portray defendant as an unjust employer; the substantial value of the verdict exaggerates that portrayal. Were we to hold the fact of the verdict had some marginal relevance to defendant’s motivation regarding plaintiff’s employment, the remoteness of the verdict to plaintiff’s termination persuades us that any possible relevance of this evidence would be far outweighed by its potential to inflame the jury. Consequently, the trial court abused its discretion in denying defendant’s motion in limine with respect to the Sobek verdict.

II

B. Amended Answer

Defendant argues that the trial court erred in denying its motion to amend its answer to include the affirmative defense that plaintiff’s misconduct in copying confidential documents limits the damages she may receive. We review a trial court’s decision on a motion to amend pleadings for abuse of discretion. *Grzesick v Cepela*, 237 Mich App 554, 563; 603 NW2d 809 (1999). Generally, leave to amend shall be freely granted where justice requires. MCR 2.118(A)(2); *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575

(2003). But leave to amend should be denied where the amendment would be futile, that is, when it is insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

The parties and the trial court apparently forgot that defendant had already asserted the affirmative defense in the answer it filed to plaintiff's amended complaint. Defendant's affirmative defenses included the statement: "That by removing confidential information from the Human Resource Department on August 17, 2000, Plaintiff was subject to immediate discharge." This language provided sufficient facts to "reasonably inform" plaintiff of the affirmative defense of a limitation of future damages due to subsequent wrongdoing by plaintiff. See MCR 2.111. Consequently, the issue was moot at the trial court, and is moot now. See *Eller v Metro Contracting*, 261 Mich App 569, 571; 683 NW2d 242 (2004), stating, "An issue is moot and should not be reached if a court can no longer fashion a remedy."

Nonetheless, we will address the merits of the trial court's conclusion that the affirmative defense was futile, in order to avoid error on remand with respect to damages.

An employer is not absolutely insulated from liability for violations of state civil rights laws merely because it discovers, after termination of the employment relationship, that the employee was culpable of wrongdoing that would have resulted in his termination. *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105, 110-111; 532 NW2d 889 (1995). A civil rights claim is not barred solely because of employee wrongdoing that could not possibly have been the reason for the employee's discharge. *Id.* However, the discovery of such wrongdoing restricts the remedy available to the employee. Front pay and reinstatement are not appropriate remedies for the employee. *Id.* at 111-112. The trial court must consider what relief is appropriate "based on the 'factual permutations and the equitable considerations' raised and in light of the remedies available under the Civil Rights Act." *Id.* at 112-113, quoting *McKennon v Nashville Banner Pub Co*, 513 US 352, 361; 115 S Ct 879; 130 L Ed 2d 852 (1995).

The trial court erred in ruling, as a matter of law, that the factual circumstances surrounding the breach of confidentiality did not establish grounds for restriction of relief based on subsequently discovered employee misconduct. Plaintiff argues that any breach of confidentiality was committed after she was terminated, when she disseminated the documents to the public by attaching them to her complaint. However, she admits that she printed hard copies of the documents and stored them in her desk before her alleged termination. Defendant contends that this conduct would have warranted her termination, even before she disseminated the documents. Accordingly, there is a question of fact that precludes the trial court's conclusion that the amendments were futile.

C. Evidence Regarding Sobek's Employment and Lawsuit

Defendant also argues that the facts surrounding Sobek's employment and lawsuit are overly prejudicial and should be excluded under MRE 403. Relevant evidence may be excluded under MRE 403 if its "probative value is substantially outweighed by the danger of unfair prejudice." *Id.* "Evidence is unfairly prejudicial if it is marginally probative but there is a danger that it will be given undue or preemptive weight by the jury." *People v Osantowski*, 274 Mich App 593, 609; 836 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008). Here, a pre-trial, blanket exclusion of evidence relating to Sobek's termination and her

subsequent lawsuit is not proper, because some of this evidence is highly pertinent to plaintiff's claim that defendant retaliated against her for supporting Sobek's civil rights action. To the extent that the facts surrounding Sobek's employment and lawsuit become overly prejudicial, the trial court can limit evidence at the time of trial. This is type of "contemporaneous assessment" is preferred by case law. *Id.* at 609. The trial court did not abuse its discretion by denying the motion in limine related to those facts. Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Henry William Saad

/s/ Michael R. Smolenski